Supreme Court, U.S.
FILED

981017 DEC 22 1998

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No. _____

In The

Supreme Court Of The United States

October Term, 1998

OLAF PETER JUDA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a federal prisoner in a habeas corpus proceeding pursuant to 28 U.S.C. § 2255 denied due process of law when the court of appeals refuses to allow the prisoner to file a statement of reasons in support of an application for a certificate of appealability, when the prisoner has meritorious issues that would entitle him to a certificate of appealability?

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than the parties named in the caption to this petition, who are Olaf Peter Juda and the United States of America.

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Petitioner, Olaf Peter Juda, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit are unpublished orders, including the order denying the certificate of appealability (App. A), and the order denying the petition for rehearing and suggestion for rehearing en banc (App. C). The order of the district court denying the certificate of appealability was an unpublished order (App. B).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") denying the certificate of appealability (App. A) was entered on November 3, 1997. The Court of Appeals denied a timely petition for rehearing on September 23, 1998 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

28 U.S.C. § 2253(c)(1) provides, in relevant part, that "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255."

28 U.S.C. § 2253(c)(2) provides, in relevant part, that a certificate of appealability may issue "only if the applicant has made a substantial showing of a constitutional right."

STATEMENT OF THE CASE

The fundamental question raised in this petition is whether a federal prisoner in a § 2255 habeas proceeding is entitled to present a statement of reasons to the Court of Appeals in support of an application for a certificate of appealability, especially when the prisoner can make a showing to this Court of a question to be raised on appeal that does meet the statutory test of a substantial showing of the denial of a constitutional right. To fully appreciate the significance of the issues presented by this case, it is essential to consider its lengthy procedural background.

A. Background of the Criminal Conviction.

Mr. Juda's criminal case has an extensive prior history. He and several other defendants were charged in 1991 with the possession of controlled substances on the high seas. The defendants were arrested on the high seas in a sailing vessel, which allegedly contained hashish, en route from the South Pacific to the west coast of Canada.

Mr. Juda filed a pretrial motion to dismiss the criminal charges on the basis of a lack of jurisdiction. The district court denied the motion to dismiss on the grounds that there was sufficient evidence of "nexus" between defendant's activities and the United States to allow for his federal criminal prosecution. The district court opinion denying the motion to dismiss was later published as *United States v. Juda*, 797 F.Supp. 774 (N.D.Cal. 1992).

Mr. Juda then plead guilty pursuant to, and conditioned upon, a plea agreement that allowed Mr. Juda to appeal the district court's decision. Mr. Juda's understanding of the terms of the conditional plea of guilty was that the plea agreement limited the scope of the issues on appeal to a review of the rationale and grounds relied upon by the district court in its denial of the motion to dismiss. Mr Juda was represented by counsel at the time of the guilty plea. He was later sentenced to a term of 262 months imprisonment, a sentence that he is still serving in federal prison.

The district court's denial of appellant's Motion to Dismiss was affirmed by a panel of the United States Court of Appeals for the Ninth Circuit court in *United States v. Juda*, 46 F.3d 961 (9th Cir. 1995). While the result of the Court of Appeals decision was to affirm the district court's denial of the Motion to Dismiss, the Court of Appeals based its affirmance on different grounds than those relied upon by the district court. While the district court based

jurisdiction on a "nexus" theory, the Court of Appeals found jurisdiction based on a theory that the vessel involved was a "stateless" vessel.

B. The § 2255 Proceedings in District Court.

After the Court of Appeals affirmed the denial of the motion to dismiss based on jurisdictional claims, Mr. Juda's conditional plea of guilty and his conviction became final. In 1996 Mr. Juda, representing himself in pro per, filed a motion to vacate his conviction and sentence, and to withdraw his plea of guilty, pursuant to 28 U.S.C. § 2255. In the motion to vacate, Mr. Juda alleged that his guilty plea was not entered knowingly and voluntarily, in violation of his right to due process as provided by the Fifth Amendment to the united States Constitution. The focus of the § 2255 motion was that Mr. Juda was never informed by the district court or his counsel that the court of appeals could decide the jurisdictional issue on different grounds than those relied upon by the district court.

After a year of litigation, the district court denied Mr. Juda's § 2255 motion in an order entered on May 1, 1997. Mr. Juda then filed a motion to amend or alter the order denying the motion to vacate judgment, which was denied by the court's order of June 9, 1997. Mr. Juda then retained counsel, who filed a motion for additional findings in regard to the order denying the § 2255 motion. The motion for additional findings was denied by the court's order of July 18, 1997. Mr. Juda filed a timely notice of appeal from these orders.

On August 7, 1997, Appellant Juda filed in the district court an Application for the Issuance of a Certificate of Appealability from the court's order of May 1, 1997 denying defendant's Motion to Vacate Judgement Pursuant

to 28 U.S.C. §2255, the order of June 9, 1997 denying defendant's Motion to Amend or Alter the Order of May 1, 1997, and the order of July 18, 1997 denying defendant's Motion for Additional Findings in Regard to The Order of May 1, 1997.

In an order entered on September 9, 1997 (App. B), the district court denied Mr. Juda's request for a certificate of appealability. In that order, the district court claimed that Mr. Juda had failed to show the violation of a constitutional right.

C. The Proceedings in the Court of Appeals.

After the district court refused to issue a certificate of appealability, Mr. Juda's counsel then sought to obtain a certificate of appealability from the United States Court of Appeals for the Ninth Circuit. After reviewing the Federal Rules of Appellate Procedure and the procedural rules for the Ninth Circuit, it became apparent to petitioner's counsel that there was no specific procedural rule for filing briefs or memoranda with the Court of Appeals in support of a request for a certificate of appealability in non-capital habeas cases. In addition, the Court of Appeals did not issue any procedural order in Mr. Juda's case for filing deadlines in regard to the application for certificate of appealabilty. Counsel for Mr. Juda therefore filed a motion with the Court of Appeals in October 1997 seeking permission to file a memorandum in support of the request for a certificate of appealability.

On November 3, 1997, two judges for the Court of Appeals entered the following order: "The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). All pending motions are denied as moot."(App. A).

On November 17, 1997, Mr. Juda filed a petition for rehearing, with suggestion for rehearing en banc, with the Court of Appeals. After a lengthy delay, the petition for rehearing was denied on September 23, 1998 (App. C).

REASONS FOR GRANTING THE WRIT

I.

The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Essential Due Process Right Of A Federal Prisoner Seeking Habeas Relief in § 2255 Proceeding To Apply For A Certificate Of Appealability In Order To Appeal The District Court's Denial § 2255 Motion To Vacate Judgment And Sentence.

The question presented for review in this petition involves a federal prisoner seeking a certificate of appealability in order to appeal the district court's denial of a motion to vacate judgment and sentence brought under 28 U.S.C.§ 2255. The relevant statute, 28 U.S.C. §2253(c), now requires that a certificate of appealability be issued before an appeal may be taken from the district court's final order in a proceeding under §2255. This new requirement was one of the many changes in federal habeas law that occurred in April 1996 in legislation titled the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Pub.L. 104-132, 110 Stat. 1214. Prior to the AEDPA, federal prisoners appealing decisions in § 2255 proceedings were not required to obtain such certificates. Under the new law, a certificate of appealability shall be issued "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Under §2253(c)(3), the certificate of appealability shall indicate the

specific issues that have satisfied the showing required by subsection (c)(2).

The new statute fails to specify the procedures for obtaining a certificate of appealability in §2255 cases. In the Court of Appeals for the Ninth Circuit, the only procedural rules governing certificate of appealability applied only to capital cases. *See* Ninth Circuit Rules 22-2 through 22-5. Prior to Mr. Juda's attempt to appeal the denial of his § 2255 motion, the Ninth Circuit had held that the district court should make the initial determination of whether a certificate of appealability should issue. *United States v. Asrar*, 116 F.3d 1268 (9th Cir. 1997).

This Court has not yet ruled on the exact test for determining whether the appellant has made a substantial showing of the denial of a constitutional right in the context of a certificate of appealability. Appellant suggests, however, that the standard is similar to that for a certificate of probable cause to appeal the denial of a petition for writ of habeas corpus under 28 U.S.C. §2254. That standard "requires something more than frivolity. . .", *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), but does not require the appellant to show that the appeal will prevail on the merits. Instead, the appellant only needs to show that "the issues are debatable among jurists of reason", and that "a court could resolve the issues [in a different manner];" or that the questions are "adequate to deserve encouragement to proceed further." Id. at 893, n.4.

This Court recently addressed the subject of certificates of appealability in § 2255 cases in *Hohn v. United States*, ___ *U.S.* ___, 118 S.Ct 1969 (1998). In *Hohn*, this Court held that a federal prisoner's application to the court of appeals for a certificate of appealability in conjunction with § 2255 proceedings is a "case" in the court

of appeals for purposes of invoking jurisdiction of the Supreme Court under 28 U.S.C. 1254(l), in order for the Court to review, by writ of certiorari, the denial of the certificate of appealability. The Court set forth several reasons why an application for a certificate of appealability is itself a case and not some preliminary threshold matter more analogous to an administrative function. These included the fact that the application for the certificate was assigned a docket number and was subject to a review process in the court of appeals similar to that of a case being decided on its merits. *Id.* at 118 S.Ct. at 1973-74. The Court also noted that most of the federal circuits have adopted procedural rules for disposition of requests for certificates. *Id.* Finally, the Court stated that to construe § 2253(c)(1) as conferring jurisdiction on the court of appeals to decide requests for certificates of appealability is more consistent with other provisions of the Federal Rules of Appellate Procedure. *Id.*

Implicit in the *Hohn* decision is the corollary rule that a request for a certificate of appealability, being a "case," should be afforded some modicum of due process similar to that afforded other appeals cases.

In the present case, Mr. Juda's appeal was assigned a docket number, No. 97-16805. At the time of his appeal, the Ninth Circuit did not have any explicit procedural rules for certificates of appealability in non-capital habeas cases. When Mr. Juda's counsel filed the notice of appeal and was denied a certificate of appealability in the district court, he waited to receive an order for a briefing schedule or other notice from the court of appeals for the certificate of appealability. When no order or notice was received, petitioner's counsel then filed a motion to allow petitioner to state reasons for why the certificate of appealability should be issued. Several weeks later, the court of appeals

issued an order denying the certificate of appealability and denying petitioner's motion to submit reasons for issuance of the certificate as "moot." As a result, the court of appeals denied petitioner a certificate of appealability while refusing to even allow him to present any argument, statement or memorandum in an attempt to obtain the needed certificate.

Petitioner submits that the court of appeals' refusal to allow petitioner an opportunity to present a statement of reasons for issuance of the certificate of appealability, when a motion for permission to submit such a statement of reasons was pending at the time that the certificate of appealability was denied, violated notions of due process and fundamental fairness. In its most basic meaning, the primary function of an appellate case is provide a party the opportunity to present arguments as to why a lower court decision was in error and should be overturned. In the absence of some form of brief, memorandum or statement of issues from the appellant, the court of appeals has no guidance as to what issues are being reviewed.

Here, in the absence of any clear procedural rule, the court of appeals denied petitioner any opportunity to present a statement or argument as to why the district court's denial of the certificate of appealability was in error and should be overturned, and why the certificate of appealability should be issued. In ruling on the merits of the issue without providing the appellant the opportunity to present any argument on those merits, the court of appeals thus subverted the core function of the appellate process.

Petitioner submits that this case provides an opportunity for this Court to provide for uniform procedures in considering requests for certificates of appealability in § 2255 cases. Although the court in *Hohn v. United States* based its decision, in part, on the fact that

most circuits have adopted procedural rules for certificates of appealability, *see* 118 S.Ct. at 1973, a closer review of those cited rules of the various circuits shows a lack of specific rules for certificates of appealability in non-capital habeas cases.

The United States Court of Appeals for the First Circuit did make changes in September 1996 to provide procedures for handling certificates of appealability in non-capital § 2255 cases, in order to implement the 1996 statutory changes to federal habeas law. *See* Historical Notes to First Circuit Rule 22.1. Under that local circuit rule, a petitioner has ten days after the district court's denial of the certificate to submit an application and memorandum in support of the issuance of a certificate of appealability.

The United States Court of Appeals for the Second Circuit has adopted Rule 22(a) concerning "certificates of probable cause" in cases governed by 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b). Second Circuit Rule 22(a) provides for an appellant to file a motion for a certificate of probable cause "promptly." As noted in *Hohn, supra* at 118 S.Ct.1974, FRAP 22(b) only applies to state, and not federal, prisoners. It is therefore questionable as to whether the Second Circuit Rule 22(a) applies to federal prisoners seeking a certificate of appealability.

The United States Court of Appeals for the Third Circuit also has local rule provisions for "certificates of probable cause" for appeals in habeas corpus cases. Assuming that this rule applies to certificates of appealability in § 2255 cases, which is unclear, Third Circuit Rule 22.1 allows a petitioner to submit a memorandum of law within 14 days of filing the application.

The United States Court of Appeals for the Fourth Circuit has clear guidelines for processing requests for

certificates of appealability. In Fourth Circuit Rules 22(a) and 34(b), an appellant in a § 2255 case, who is seeking a certificate of appealability, has 21 days after receipt of notice from the court of appeals to file an informal brief listing the issues, facts and arguments to be raised on appeal. The matter is then considered by the three-judge panel to which the proceeding has been referred.

The United States Court of Appeals for the Fifth Circuit has provisions for certificates of appealability in cases involving state prisoners (Fifth Circuit Rules 8 and 27.2.3), but there do not appear to be any provisions for federal prisoners seeking certificates of appealability in appeals of § 2255 proceedings.

The United States Court of Appeals for the Sixth Circuit only has rules for certificates of probable cause in death penalty cases. *See* Sixth Circuit Rule 28. Similarly, the United States Court of Appeals for the Seventh and Eighth Circuits have provisions for certificates of probable cause that are only discussed in the context of death penalty cases. *See* Seventh Circuit Rule 22, Eighth Circuit Rules 22A and 27B.

As discussed earlier, the United States Court of Appeals for the Ninth Circuit presently only has rules for certificates of appealability in death penalty cases. The Ninth Circuit has recently proposed rules for certificates of appealability in non-capital habeas cases, including § 2255 cases, which allow an appellant to file a statement of reasons for a certificate in the court of appeals within thirty-five days of the district court's denial of the certificate. These proposed change in the Ninth Circuit Rules are discussed later in this petition.

The United States Court of Appeals for the Tenth Circuit has one rule for "certificates of probable cause" in

non-death penalty habeas cases, in which an appellant may file a request for a certificate of probable cause within 30 days of the district court's denial of a certificate of probable cause. *See* Tenth Circuit Rule 22.1.

The United States Court of Appeals for the Eleventh Circuit only has provisions for certificates of probable cause in state habeas corpus cases and in death penalty cases. *See* Eleventh Circuit Rules 22-1 and 22-3.

To summarize this survey of local rules among the federal circuits, only the First and Fourth Circuits have enacted rules specifically adapted for the 1996 changes in federal habeas law requiring certificates of appealability in § 2255 cases. Considering that the statutory changes requiring certificates of appealability in § 2255 cases were enacted over two and one-half years ago, the failure of most circuits to promulgate corresponding procedural rules requires this Court's attention to announce a clear uniform standard for the processing of certificates of appealability. Mr. Juda's case is a classic example of how the lack of clear procedural rules allows a court of appeals to effectively, and unfairly, terminate an appeal without giving an appellant a chance to even present a statement of reasons in support of a certificate of appealability. For these reasons, petitioner urges this Court to issue a writ of certiorari in this case.

II.

The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings On The Due Process Right Of A Federal Prisoner In A § 2255 Proceeding To Be Granted A Certificate Of Appealability When The Prisoner Has Made A Substantial Showing Of The Denial Of A Constitutional Right.

The order of the court of appeals denying the certificate of appealability in Mr. Juda's case (App. A) states no reason for the denial, does not address the merits of the issues presented for review, nor does it mention or address the previous district court order denying the certificate. Aside from the manner in which the court of appeals' denied the certificate of appealability, it is also incumbent upon petitioner to show this Court that the proposed issues presented for appellate review in the § 2255 proceedings constitute a substantial showing of the denial of a constitutional right, which is the statutory standard for issuance of the certificate under 28 U.S.C. § 2253(c)(1). Petitioner therefore submits this statement of the issues to be presented on appeal in support for a certificate of appealability.

A. The Petitioner's Guilty Plea Was Involuntary.

In its order of May 1, 1997, denying the §2255 motion, at pp. 7-9, the district court recognized that Mr. Juda had raised a constitutional claim that his guilty pleas were not knowing, intelligent, and voluntary, and that a challenge to the voluntary and intelligent character of the plea is a proper issue in a federal habeas action. The §2255 motion clearly alleged that Mr. Juda was not informed at

the time of the plea that the court of appeals could decide the issue of jurisdiction on a different ground, namely on the basis of statelessness, then that which the district court based its jurisdictional ruling, which was whether there was evidence of sufficient nexus to the United States. In addition, the Motion For Additional Findings filed on June 23, 1997 clearly stated that Mr. Juda would not have entered his guilty plea if he had known or been informed by the trial court, or his counsel, that the court of appeals could decide the issue of jurisdiction on different grounds than those relied upon by the district court. Mr. Juda also alleged that, if he had maintained his plea of not guilty and gone to trial, he would have had a potential defense. Mr. Juda would have proposed a defense of manufactured jurisdiction, a variation of the entrapment defense, in which he would have attempted to show that government agents took actions with foreign governments which forced the vessel in question to become stateless, in order for the agents to obtain jurisdiction over defendant's activities that otherwise had no connection to the United States.

The appellant's claim that the plea was involuntary, and thus violated his constitutional rights, incorporates several different, but overlapping, issues to be presented on appeal. It involves a claim of ineffective assistance of counsel, as discussed in the Motion For Additional Findings filed June 23, 1997, for his counsel's failure to explain the meaning and possible ramifications of the conditional plea agreement. It involves a question of law as to the application of contract law and Federal Rules of Criminal Procedure 11 in order to effect the proper interpretation of the terms of the plea agreement, and to assess the reasonableness of appellant's understanding of the terms of the plea agreement, in order to determine the ultimate issue of whether his plea was entered knowingly, intelligently,

and voluntarily.

In its order of May 1, 1997, the district court held that it was not reasonable for appellant to believe that the plea agreement was conditioned upon, or restricted to, to an appellate review of the merits of the grounds relied upon by the district court in its jurisdictional ruling. Petitioner is unaware of any controlling case on this issue, and the question appears to be one of first impression. Petitioner submits that the question of the voluntariness of his guilty pleas, when conditioned upon a right to appeal, is an issue that is debatable among jurists, and that the court of appeals could resolve the issue in a different manner than did the district court, and that the question is adequate to deserve encouragement to proceed further. After all, the right to appeal the jurisdictional issue was the only benefit derived by Mr. Juda from the plea agreement. It is logical that his understanding of the scope of that appeal was integral part to his acceptance of the plea agreement.

The district court recognized in its order of May 1, 1997 that plea agreements are subject to contract law standards and reached a result based upon its perception of the facts surrounding the plea agreement and the entry of the plea. Another court, however, could easily have a different interpretation of the language of the plea agreement in this case and the reasonable intent and understanding of the appellant when he entered into that plea agreement. The application of contract law principles to these facts presents a mixed question of fact and law, amatter of de novo review in the court of appeals, which directly affects issues regarding the voluntariness of petitioner's guilty plea.

B. Ineffective Assistance of Counsel.

The issue of ineffective assistance of counsel is connected to the issue of the involuntariness of the guilty plea, as discussed earlier in this petition. The declaration filed in support of the Motion For Additional Findings clearly stated that Mr. Juda would not have accepted the terms of the plea agreement, and pleaded guilty, if his counsel would have advised him that the court of appeals could decide the issue of jurisdiction on different grounds than those relied upon by the district court.

A claim of ineffective assistance of counsel is clearly a constitutional claim in that the Sixth Amendment guarantees that a defendant in a criminal case has the right to effective assistance of counsel. Mr. Juda submitted a declaration in the § 2255 proceedings stating that he would not have pleaded guilty if he had been correctly advised by his counsel as to the terms and limitations of the plea agreement, including the appeal allowed for in the plea agreement. He has thus established the prejudicial effect of his attorney's failure to adequately explain the scope of the appeal, including the scope of the court of appeals actions in ruling on the appeal.

C. Rule 11 Violations.

As discussed earlier, the issue of whether the district court complied with the requirements of Federal Rule of Criminal Procedure 11(c) and (e) is closely related to the issue of whether the guilty plea was involuntary. Mr. Juda argued in his § 2255 motion that he would not have pleaded guilty if the district court would have explained that alternative theories of jurisdiction, namely statelessness, could be the jurisdictional grounds for the offenses charged, and that the court of appeals might base jurisdiction on one

of those alternative grounds.

When a guilty plea is challenged in §2255 proceedings on the basis of a violation of Fed. R. Crim. P. 11, a defendant has a greater burden of showing the violation resulted in a constitutional error or a complete miscarriage of justice or in a proceeding inconsistent with the demands of fair procedure. *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979). Although *Timmreck* requires a higher burden of proof in an attack on a guilty plea in a §2255 proceeding, this Court has held that the requirements of the test are satisfied when a defendant shows that there was a reasonable probability that, but for the court's error in receiving the plea, they would not have plead guilty. *Timmreck* at 441 U.S. 783. *Timmreck* itself strongly suggested that a defendant who was improperly advised by a court of a significant consequence of that plea, in that case a mandatory parole term, would have a sufficient basis for collateral relief. *Timmreck* at 441 U.S. 784).

In this case, petitioner can meet the test established in *Timmreck*. Mr. Juda's belief, that the appeal of the district court's decision was limited to a review of the grounds relied upon by the district court, was just as serious an error as errors discussed in *Timmreck*. The district court's explanation of jurisdiction, or lack of explanation, did not adequately explain or correct Mr. Juda's mistaken belief. Since Mr. Juda stated in a declarations filed in his §2255 proceedings that his understanding of the plea agreement as to the scope and limits of the appeal was a major factor in his decision to plead guilty, the petitioner has established a prima facie showing of a claim for relief that satisfies the requirements of *Timmreck*. The §2255 motion in this case clearly made an allegation that, for several reason, the plea was not entered knowingly and voluntarily, and thus violated Mr. Juda's constitutional

rights. He was prejudiced by the error because the court, at the time of the guilty plea, failed to make full inquiry and disclosure to appellant of the terms of the plea agreement, and because appellant would not have pleaded guilty but for those errors in understanding the full consequences of the plea and the terms of the plea agreement. The appellant is clearly appealing a constitutional claim as to the validity of his guilty plea.

D. Manufactured Jurisdiction.

The issue of whether there is a defense of manufactured jurisdiction, where the action of government agents to block registration of a vessel in order to render it stateless and thus be subject to United States jurisdiction, is closely linked to the issue of the involuntariness of the guilty plea. As stated above, Mr. Juda believed that, if the basis for jurisdiction over the alleged offenses was statelessness, he had a defense at trial of manufactured jurisdiction. The appellant's belief in this possible defense is important because it provides a rationale as to why the appellant claims he would not have pleaded guilty if he had been informed that the court of appeals might decide the question of jurisdiction on the grounds of statelessness.

E. Amendment of The Indictment.

In the Motion For Additional Findings filed on June 23, 1997, appellant alleged that the previous decision of this Court in his case amounted to an amendment of the indictment on a theory of jurisdiction, statelessness, that was not presented to the grand jury. The appellant's belief that the grand jury did not indict on a theory of statelessness is based upon the appellant's declaration filed in support of

the Motion For Additional Findings in which he sets forth evidence that the grand jury indicted under a theory that the sailing vessel was owned by an American citizen, which is, of course, a component of the "nexus" theory of jurisdiction. The appellant's declaration points out that it was the government's response in October 1996 that established the basis and theory of jurisdiction relied upon by the grand jury to find jurisdiction. The court of appeals' decision therefore broadens, not limits, the theory upon which jurisdiction, an essential element of the offense, is based.

It is well-established that an impermissible amendment of the indictment violates the due process clause of the Fifth Amendment. *Miller v. United States*, 471 U.S. 130 (1985). In this case, unlike *Miller*, the amendment to the indictment did not narrow the charge, but instead broadened the charge against appellant. Petitioner therefore submits that he has established a substantial showing of a constitutional claim on this issue.

Petitioner submitted all of the above issues to the raised on appeal in his original application to the district court for a certificate of appealability. The district court's order denying the certificate of appealability failed to address the individual issues on appeal set forth in the application for certificate of appealability. Instead, the district court lumped all of the issues together and concluded that the defendant's claims really amounted to an assertion that he had a right to have the appeal of the pretrial motion to dismiss be decided on the same grounds upon which the district court based its decision to deny the motion to dismiss. The district court then stated that petitioner had not raised a constitutional claim because he did not have a constitutional right to have the appellate court decide issue on the same grounds.

Petitioner submits that the district court grossly misstated the issues sought to be raised on appeal. The district court's denial of the application for a certificate of appealability was simply based on an erroneous understanding of the appellant's claims. It was the appellant's misunderstanding and lack of knowledge of the terms of the plea agreement, which was caused by the errors of the court and his counsel at the time of his entry of the guilty plea, and not the technical meaning of the terms of the agreement, that form the factual basis for his §2255 claim. It is this failure to inform defendant about the full and true consequences of accepting the plea agreement and pleading guilty, along with the prejudice resulting from such lack of knowledge, that go to the heart of appellant's claim of a constitutional violation in the entry and acceptance of his guilty plea.

As a result of petitioner's unknowing and involuntary guilty plea, he pleaded guilty to a charge without fully understanding the consequences of his plea and the terms of the plea agreement. As this Court noted over fifty years ago, "no principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

III.

The Petition Should Be Granted Because The Court Of Appeals For The Ninth Circuit Has Now Proposed Procedural Rules Establishing The Right Of An Appellant To File A Statement Of Reasons In Support Of A Certificate Of Appealability, Which, If Applied Retroactively, Would Entitle The Petitioner To File The Memorandum In Support Of Certificate Of Appealability Which Was Disallowed By The Opinion Below.

In the course of preparing this petition for a writ of certiorari, petitioner became aware of a new proposed change in the Rules of the United States Court Of Appeals for the Ninth Circuit ("Ninth Circuit Rules"). Under new proposed Ninth Circuit Rule 22-1(c), first made available by the court of appeals for notice and comment in November 1998, a petitioner in a § 2255 proceeding who was denied a certificate of appealability in the district court would be allowed to file in the court of appeals, within thirty-five days after the district court's denial, a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any claim. This is the first time that the court of appeals for the Ninth Circuit has promulgated rules to govern procedures for certificates of appealability in non-capital habeas cases under § 2255. Although the November 1998 notice did not provide an effective date for the proposed rules, it did establish a period for public comment that ended on December 9, 1998. If these proposed rules had been in effect at the time of petitioner's attempted appeal, Mr. Juda would have clearly been entitled to file a motion and supporting memorandum setting forth the issues sought to be appealed and the reasons supporting those claims. The fact that the court of appeals is

finally addressing the need for standard procedures in processing certificates of appealability is an additional indication that the court of appeals is now aware of the need for such procedural rules. The fact that the Ninth Circuit is offering these changes in the rules after this Court recognized in *Hohn v. United States* that applications for certificates of appealability do constitute "cases" on appeal indicates that the court of appeals may be changing their rules in response to the decision in *Hohn* by affording greater procedural protections to a prisoner's request for a certificate of appealability.

Petitioner submits that it is appropriate for this Court to issue a writ of certiorari with directions to the court of appeals to reconsider its denial of the certificate of appealability in this case in light of this Court's decision in *Hohn v. United States* and pursuant to the procedures set forth in proposed Ninth Circuit Rule 22-1.

CONCLUSION

This case presents a question of exceptional importance - whether a federal prisoner, who is seeking to appeal a denial of his § 2255 motion to vacate judgment and sentence, is entitled to present a memorandum and statement of reasons to the court of appeals as part of his application for a certificate of appealability. Petitioner submits that he was denied basic due process by the manner in which the court of appeals denied his application for a certificate of appealability. Unless this Court steps in to establish uniform procedures for handling these applications for certificates of appealability, the courts of appeal will likely continue to handle issues involving certificates of appealability in a haphazard manner that unfairly denies a prisoner's meaningful access to the courts.

For the foregoing reasons, petitioner Olaf Peter Juda respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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OLAF PETER JUDA

APPENDIX

Appendix A - Order of the United States Court Of Appeals for the Ninth Circuit Dated and Filed November 3, 1997

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

OLAF PETER JUDA,
Defendant-Appellant.

No. 97-16805

ORDER

Before: THOMPSON and KLEINFELD, Circuit Judges

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2). All pending motions are denied as moot.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

Appendix B - Order of the United States District Court for the Northern District of California at San Francisco Dated and Filed September 9, 1997

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Nos. C-96-2050-CAL
CR-91-324-CAL

OLAF PETER JUDA,
Defendant.

ORDER

The numerous prior proceedings involving Mr. Juda are outlined on pages one through five of this court's order of May 1, 1997. In addition, that order described in detail the reasons for this court's denial of Mr. Juda's motion under 28 U.S.C. § 2255. That order was also the subject of two subsequent orders (June 9, 1997 and July 18, 1997) resulting from subsequent motions by Mr. Juda.

Mr. Juda has filed a notice of appeal from this court's decisions, and he now seeks a certificate of appealability under 28 U.S.C. § 2253. A certificate of appealability may issue only if Mr. Juda "has made a substantial showing of the denial of a constitutional right."

Mr. Juda has not made the required showing. His claims are founded in one central argument. That is, he argues that a constitutional right was violated because the United States Court of Appeals affirmed this court's jurisdiction over him on different reasoning than had been used by this court. That subject was fully discussed in this court's order of May 1, 1997. This court can find no constitutional right to have an appellate court employ the

same reasoning as a district court. Nor is there any constitutional right for an appellant to assume that an appellate court must use the same reasoning as a district court. Numerous cases, cited in the order, hold that a court of appeals can affirm a decision of a district court on any ground having support in the record, even if the district court relies on wrong grounds or on wrong reasoning. Such authorities are adequate evidence of the absence of any constitutional right as Mr. Juda argues. All of defendant's grounds for seeking a certificate of appealability center on that basic issue of the reason for the decision for the U.S. Court of Appeals.

This court therefore does not believe that Mr. Juda's arguments meet the required standard of § 2253 or the standard stated by the United States Supreme Court in Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

IT IS THEREFORE ORDERED that a certificate of appealability is denied.

Dated: September 9, 1997.

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

Appendix C - Order of the United States Court Of Appeals for the Ninth Circuit Dated and Filed September 23, 1998

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

OLAF PETER JUDA, Defendant-Appellant.

No. 97-16805

ORDER

Before: THOMPSON and KLEINFELD, Circuit Judges

Petitioner's motion for a ruling on his petition for rehearing is granted.

The petition for rehearing is construed as motion for reconsideration of this court's November 3, 1997 order. So construed, the motion is denied. See 9th Cir. R. 27-10. The suggestion for rehearing en banc is rejected on behalf of the court. See General Order § 6.11.